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In the Supreme Court of the United States.

TEXAS AND PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs. No. 16

W. W. CLARKSON,

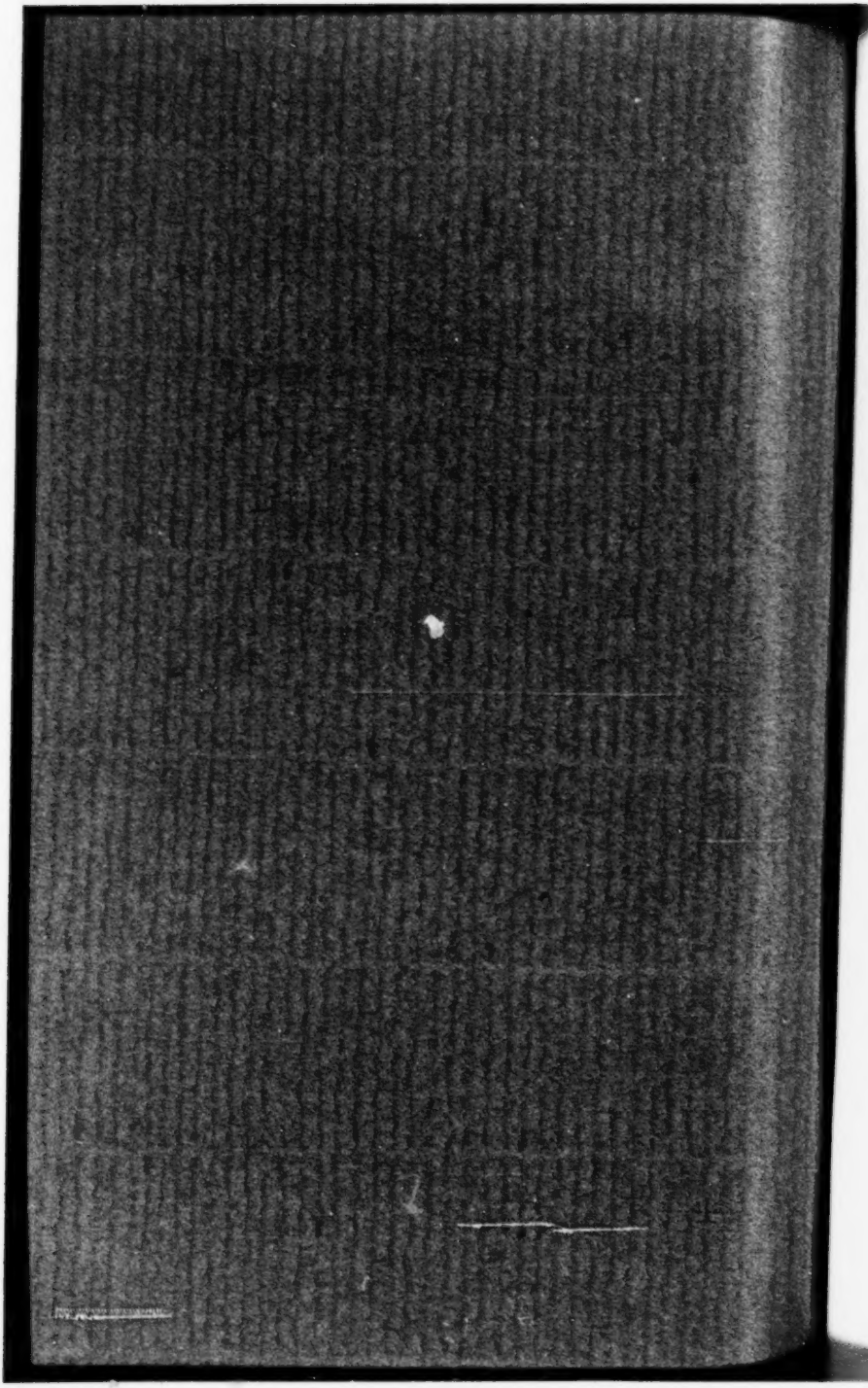
Defendant in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

[illegible]

W. W. CLARKSON,
Defendant in Error.



In the Supreme Court of the United States.

TEXAS AND PACIFIC RAILWAY COMPANY

Plaintiff in Error,

vs. No. 48

W. W. SWEARINGEN, *Defendant in Error.*

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

The preliminary statement of the pleadings and other proceedings by plaintiff in error is correct, and so much of the evidence as is there given is also correct.

However, the evidence as contained in the bill of exceptions is set out in full in the record (pp. 19-32) and is

there so condensed that further condensation is not practicable, and reference is therefore made to same as there set out and will not be here reproduced, but such parts of it as may be considered necessary in the argument will be given in the appropriate place.

There are but two questions in the case and these are (1) did the court commit prejudicial error, if any, in excluding the testimony offered by defendant, plaintiff in error here, concerning which complaint is made by it in its brief herein under its first assignment of error? and (2) did plaintiff, defendant in error here, assume the risk of injury in the manner in which he was injured?

I.

Counter Proposition Under Plaintiff in Error's First Assignment of Error.

The court correctly excluded the evidence mentioned in said first assignment, because it was not evidence of any fact in issue in the case, or, if it should be held that it was competent, still its exclusion was harmless error, because, at the utmost, it was no more than cumulative.

(1) The reference therein to track scale boxes is too indefinite and general to give notice of this particular scale box and its location, or that there was a scale box in the El Paso yards, the place where the injury occurred.

(2) The application from which same is taken was made two years prior to the injury and pertains to a different employment from that in which defendant in error

was engaged at the time he was injured, namely, service as brakeman on the road, (and which defendant in error had long since left) and it did not contemplate his rendition of services in the El Paso yards, hence could not have applied to the scale box in question.

(3) Even though the evidence had been competent and proper on the question of notice, its exclusion was harmless error by reason of the fact that defendant in error testified that prior to his injuries he knew of the location of said track scale box and said track No. 2, and giving the excluded evidence the utmost possible effect as notice it could not have more fully informed him.

(4) The four questions and answers constituting the rejected evidence, are all offered together and it is not contended in argument by plaintiff in error that any one of them except the first has any tendency to show notice to defendant in error of the location or danger of the said scale box, and the failure to separate that question from the others was sufficient to justify the court in excluding all of them.

(5) The language employed in the first of said questions does not inform the employe that any of the structures there referred to are in dangerous proximity to the track, but rather leaves the contrary inference and would give him to understand that said structures are at a safe distance from the track, so long as the employe is not guilty of any negligence.

(6) Such clauses and provisions in applications for

employment are held viod under the laws of Texas as an effort to limit or avoid liability for one's own negligence, and, therefore, against public policy, and the courts will not give effect to them indirectly when refusing so to do directly.

We add to the statement of plaintiff in error under this assignment the following testimony of plaintiff: "When I worked for defendant as brakeman I had nothing to do with switching in the yards."

ARGUMENT.

Counsel for plaintiff in error in their argument studiously ignore the fact that at the time defendant in error was injured he was not working under employment procured by virtue of the application from which the excluded evidence was taken. This application was made nearly two years prior to the time defendant in error received his injuries and was for employment in a different branch of the service, to-wit, as brakeman, and under the employment procured by virtue thereof, the defendant in error worked but one trip between El Paso and Toyah, and then resigned, and did not re-enter the service of plaintiff in error until about six weeks prior to receiving his injuries, and had not been employed as a switchman, in which capacity he was injured, but one week at the time he was injured. In view of these facts it is respectfully submitted that anything contained in said application is wholly incompetent and irrelevant upon any of the issues in this case.

The attention of the court is further directed to the fact that in the argument of counsel for plaintiff in error they assume that the excluded evidence informed defendant in error of the dangerous proximity to the track of the company's scale boxes along its line. This is not the case, and, as stated above, the language quoted will not bear that construction; but on the contrary, makes the danger to the employe dependent upon his failure to exercise due care, which would be true of any branch of employment in the railway service.

Not only does the first question which it is so strenuously argured gives the warning of the dangerous location of these structures, fail to give such warning, but the succeeding question endeavors to put upon the employe the burden of seeking out and locating said structures himself, a duty which the law does not impose upon him and will not permit the master so to do by the method employed by plaintiff in error.

No contention has been made that the excluded evidence was valid as a contract, but it is sought to reach the same result by insisting in argument that it was competent as tending to show the existence, proximity to the tracks and danger therefrom of the scale box. Plaintiff in error owns probably more than 1500 miles of track and it seems untenable to contend that the general statement that it is necessary, at certain points on the line, to have divers structures, among them track scale boxes, which may cause injury to the employe if he fails to use due

care, can be construed into, or has any tendency to show, knowledge upon the part of an employe of the location of any particular structure, none having been specified. As well might the employe be told in general terms that railroading is a hazardous business, and he is liable to injury unless he shall use due care. There is scarcely an instrumentality used by a railroad in the operation of its trains which will not cause injury to employes not using due care, and if an employe may be made to assume the risk of injury by any number of them, by enumerating them with an injunction to use due care, why may not he by a similar process, be made to assume each and all the perils and hazards of the business arising from the company's negligence? The duty to use due care rests upon the employe without such notice and the giving of it can neither add to, nor detract from, that duty, hence the excluded evidence was not of a character to place upon plaintiff any greater responsibility than already attached to him, nor to relieve plaintiff in error of its duty in the premises.

A similar clause was discussed in the case of G., C. & S. F. Ry. vs. Darby, 67 Southwestern, 446, a Texas case, and the Court of Civil Appeals decided that it was viod as a contract and that it did not constitute any notice whatever and sustained the trial court in ignoring it in the charge to the jury. A full discussion of such clauses is had in the case and numerous authorities are cited, and reference will here be made to same without further citation.

In view of plaintiff's testimony that he knew of the location of the scale box between tracks Nos. 1 and 2 before he was hurt, and that this was more than said excluded evidence could have established if admitted, its exclusion was harmless error, even if the court should decide that it was competent.

II.

The other assignments of error all go to the second point mentioned above, namely, that of assumed risk, each presenting it in one form or another, and all will be considered together under one proposition, which is as follows:

In order to charge a servant with the assumption of the risk of injury from a danger created by the negligence of the master, it must be shown that the servant had knowledge of such danger and continued in such employment without complaint, or else, that such danger was so obvious and patent that by the exercise of ordinary care he might have known of it. In this case the evidence shows that the danger through which plaintiff received his injuries was created by the negligence of the defendant, and that it was a latent danger and unknown to plaintiff and that at the time of receiving his injuries plaintiff was in the exercise of due care, hence it would have been error for the court to have instructed the jury as requested in said motion of defendant.

The several statements made by plaintiff in error are not considered full enough nor are they succinct. Hence defendant in error submits the following additional:

Statement.

The evidence establishes these facts:

1. That defendant erected, and for years maintained, in dangerous proximity to the north rail of track No. 2 the scale box structure in question.

Plaintiff testified that the space in the clear between the ladder on the side of the car on said track No. 2 and the nearest side of the scale box was 21 inches. (Rec. p. 21); also that scale boxes on other railroads in El Paso are farther from the side tracks than was this one, that on the Rock Island Railway being 117 inches, on the G., H. & S. A. Railway 168 inches, and on the A., T. & S. F. Railway 130 inches. (Rec. p. 22.)

E. B. Smith, defendant's superintendent of terminals, testified, that the space in the clear between the scale box and the ladder on a car on track No. 2 is 19 1-2 inches (Rec. p. 25), and that a well developed man cannot safely pass through that space while riding on the ladder on the side of a car if he hangs out from the car, (Rec. p. 25), but that a man using proper care could safely pass through it (Rec. p. 25).

Switchman Williams testified that he found out the first day he worked in defendant's yards that the scale box would not clear a man riding on the side of a car unless he was careful and used precaution, (Rec. p. 26), and Fireman Butts testified to substantially the same thing, saying he found out right away, (Rec. p. 29), as did, also, Yardmaster Moore who fixed the time within a week. (Rec.

p. 30). He said "if a man in passing the scale box on the ladder of a car swings out he will strike it. He must hug the car to clear it."

S. M. West, defendant's scale expert and inspector, fixes the clear space between the scale box and the ladder on a car on said track No. 2 at 21 inches. (Rec. p. 28). He also stated that if one's feet rested on the brake beam or oil box while he held the ladder with his hands it would throw his body out farther from the car and his head and shoulders would strike the scale box, (Rec. p. 39), while if he stood in the stirrup holding the ladder with the hands one's body would clear the scale box; that he, himself, tested it and found that his body would clear the scale box six inches, (Rec. p. 39); that in 1892 he built the scale box where it was when plaintiff was hurt and there has been no change in its location since then (Rec. p. 28).

2. That plaintiff was not guilty of any negligence at the time he was hurt.

Plaintiff testified that as a brakeman he had nothing to do with switching in the yards (Rec. p. 20) and that he did no switching there prior to January, 1902, during which month he switched extra in El Paso yards two nights and three days, and that he did not remember using No. 2 track during that time. (Rec. p. 22.) He had switched seven days consecutively next before the time he was hurt. (Rec. p. 20.) The scale box was painted a light green (Rec. p. 19) and plaintiff was injured after dark. (Rec. p. 20.)

Plaintiff further testified, (Rec. p. 20); "My duties as a switchman were to assist in the moving, placing and switching cars, coupling and uncoupling them, and making up trains, and generally to obey the orders of Yardmaster Moore, under whom we were working, and my duties also required me to ride on the cars while they were being moved. • • • • My station was with the engine. The engine was at the west end of the yards, west of track No. 2 with me with it, and it backed down east into No. 2 track, with me riding on the foot board at the east end of the engine, to get these cars, and we passed the scale box although I did not see it, and reaching the cars I coupled the engine on to them and not getting the signal from the yardmaster who was still further east of me as was also the other switchman, Williams, I walked east down the string of cars about two car lengths, and getting the signal I passed the same to the engineer, and the engine and cars started up again, going west so as to get out on another track, and as the cars started I got on a box car to ride down past the switch at the west end of track No. 2, so as to throw the switch and let the train in on another track. There is a ladder on the side of a box car, and a step called a stirrup under the ladder under the bottom of the car, and I was holding onto the ladder with my hands (illustrating by holding his hands above his head as if climbing a ladder) and my lantern was hanging on my right arm and I was looking back east for a signal from the yardmaster, as it was my duty to do. I do not know

whether he wanted to give me one or not, but it is my duty to be on the lookout, although I do not have to look in his direction all the time. • • • • • We had probably 8 or 10 cars at the time, and I was riding properly and hanging out a little from the car, which is proper, and I was on the north side of the car, which was also proper, so as to signal the engineer."

Plaintiff further testified (Rec. p. 22): "I knew the location of the scale box before I was hurt. I knew it was between tracks Nos. 1 and 2, but I did not know anything with reference to its proximity to track No. 2, and I did not know it was dangerously close to track No. 2. At the time I was hurt I had no knowledge of the distance between the scale box and No. 2 track. I set cars on the scale track to be weighed, but I would be on the north side of the cars on track No. 1, and as the scale box is on the south side I could not see it. I had nothing to do with the scale box and had no business around it. I first learned the exact distance between the scale box and the nearest rail of track No. 2 a few days ago when I went down and measured it at your (referring to plaintiff's attorney) recommendation. I was never warned about the danger of getting knocked off the cars by this scale box, and at the time I was hurt I was attending to my work and thinking about my duties and looking for a signal from the yardmaster, and was not thinking about the box. I did not see it immediately prior to the time I struck it. The scale box was at the same place when I struck it as it was when I

first went to work for defendant. During the seven days I worked for defendant we never used this No. 2 track at the west end or near the scales, and I never saw a car on track No. 2 opposite the scales, and never had my attention called to the distance between the track and the scale box. I never measured or approximated the distance to it. Nothing ever occurred to attract my attention to it."

Plaintiff further testified that he had set cars on the scale track to be weighed, but had never helped to clear No. 2 track so the weigher could get to the scale box, and denied that he had any conversation with Switchman Williams about the scale box not clearing a man on the side of a car on track No. 2. (Rec. p. 23.)

E. B. Smith, defendant's superintendent of terminals testified: "While riding on a car on the ladder the customary position of a switchman is to swing out from the car with his body." (Rec. p. 25). "I have seen switchmen riding on the oil box and brake beam, and have told them not to do it, but I never discharged anyone for doing it." (Rec. p. 25.)

Yardmaster Moore testified (Rec. p. 30): "We employ a code of signals by means of a lantern to do switching at night, and it is proper for a switchman to look out for signals from others, and it is proper for a switchman to ride on the ladders of a car. It is a common practice for switchmen to put their feet on the oil box and grab hold of the ladder while switching, and, in my judgment, there is no more danger in putting your feet on the oil

box and catching the ladder to ride than there is in putting your feet in the stirrup and holding the ladder. The stirrup is not in the way of the feet or legs when riding with the feet on the oil box and holding the ladder."

Scale Inspector West testified, (Rec. p. 29): "Neither the oil box nor the brake beam are put on the car to be ridden on with the feet but the switchmen use them for that purpose all the time. I have seen them do it a thousand times in the El Paso and other yards of the defendant."

Authorities and Argument.

Upon the hearing of this cause in the circuit court of appeals, defendant in error cited and reviewed a number of authorities upon the question of assumed risk, nearly all of which are cited and reviewed by the learned judge who wrote the opinion in the case in that court, and since said opinion is set out in the transcript of the record in this court, defendant in error will not here cite and review said authorities, but will merely refer to them as cited and reviewed in said opinion, adding a few only which are not reviewed or cited in that opinion:

Cent. Tr. Co. vs. E. T. V. & G. R., 73 Fed. Rep., 661, a case of injury by station limit board. It was held that the servant did not assume the risk, although he had seen the board before.

This court speaking through Mr. Justice White in T. & P. R. Co. vs. Archibald, 170 U. S., at 674, used the

following language which is particularly applicable to the point under discussion:

"Indeed, the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty or endeavor to supply safe appliances, since it subjects an employe to all risks arising from unsafe ones if the business be carried on by the employer without reasonable care and the employe knew, or by diligence could have known, *not of the dangers incident to the business, but of the harm possibly to result from the employer's neglectful methods.*"

In George vs. Clarke, 85 Fed. Rep., 608, is very tersely stated the rule as to risks assumed by the servant: "A risk which the master has created by doing or permitting something to be done which ought not to have been done, or by omitting some precaution which, in the exercise of ordinary care ought to have been taken, cannot be regarded as one of the ordinary risks of any employment."

The case of the G., C. & S. F. Railway Co. vs. Darby, 67 S. W. Rep., page 446, a Texas case, cited in the opinion of the circuit court of appeals, and also *supra*, was a case of a projecting roof of an oil house which inflicted injury upon a brakeman on a caboose, and states clearly the law applying to such cases and covers every point raised in this case, including the introduction in evidence of part of an application similar to that offered in the present case; and the case of the G. H. & S. A. R.

Co. vs Mortson, also cited in the opinion of the circuit court of appeals, is reported in 71 S. W. Rep., 707, being also a Texas case.

So far from being a case in which a peremptory instruction for defendant should have been given, it is respectfully submitted that the evidence so preponderates in favor of plaintiff on the question of his lack of knowledge on the question of danger that fair minded men could scarcely arrive at any other conclusion than that he did not have such knowledge and was not guilty of a failure to exercise ordinary care in failing to discover it.

"It is only where the facts are such that reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

Grand Trunk R. C. vs. Ives, 144 U. S., 408 at 417.

Gardner vs. Mich. Cent. R. Co., 150 U. S., 349 at 361.

Richmond & D. R. Co. vs. Powers, 149 U. S., 44.

Mo. Pac. R. Co. vs. Everett, 161 U. S., 451.

These cases are also cited generally on the questions arising in the case.

Unless the plaintiff assumed the risk of injury the exception must be overruled. He testified that he was not aware of the proximity of the scale box to the north rail of track upon which he was riding when injured, nor did he know that it was dangerously close to said rail, hence unless he be charged with knowledge on the theory that the danger was so patent and obvious that

he is conclusively presumed to know it, the trial court was correct in refusing to give the requested charge. That it was dangerously close to said track 2, and was negligently so placed by the defendant, is not seriously controverted, and plaintiff in error has briefed the case upon that assumption. Starting with this basis let us see what burden is cast upon defendant in error. He owes no duty to inspect and discover dangers created by the master's negligence, and is only required to exercise ordinary diligence in the use of his faculties, and if such dangers are not disclosed to him thereby he is not chargeable with knowledge of them. He has a right to presume that the master will furnish him a track free from obstructions, and he is in a proper place and performing his duty in a proper manner when injured. It was after dark and the scale box was of a color not to be easily seen after nightfall, and it was the first time he had passed that scale box on the side of a car on that track 2, and, at the time, he was looking in another direction for a signal, as it was his duty to do, and not being aware that he was approaching the scale box he had no opportunity to observe its dangerous proximity. He had never seen a car on that track 2 opposite the scale box and nothing had occurred to attract his attention to its proximity thereto. He had a general knowledge that the scale box stood between tracks 1 and 2, and that was all he knew about it. He had nothing to do with the scale box and had not been about it except to set cars on the scale

(No. 1) track to be weighed, and then he was on the north side of said scale track and the car that was being weighed was always between him and the scale box and he could not see it. He had only worked in the yards as a switchman a few days and he testified that he had no recollection of passing the scale box on track 2 prior to a few minutes before the injury, when he passed it on the foot board of the engine. He did not notice the scale box at that time, and even though he had it is not to be supposed that with the engine in rapid motion he could have taken any accurate measurements of the probable clearance between such scale box and a passing car. Now that plaintiff has been injured and accurate measurements of the distances have been taken the danger has become apparent to all of us; but was it so before? Since no duty of inspection devolved upon plaintiff he was not required to "lay a foot rule" to the structure, and in the absence of a car opposite it on said track 2 there would be nothing to call attention to the limited clearance. The rail of said track 2 is so nearly even with the surface of the ground as to be of little aid to the casual observer and is certainly not calculated to attract special attention or at once impress upon a person the dangerous proximity of the scale box to the track. Up to the time he was injured he had never before been placed in a situation with reference to this structure that he did, or could, observe its exact location with reference to safety in passing it upon track 2, and it is for the jury to say whether or not he acted with

ordinary prudence at that time. At the utmost the additional space required for safe clearance between the scale box and the rail of track 2 is a matter of but very few inches, perhaps three to six, and it would take a trained eye to even approximate the distance between those objects and determine the question of safety when applied for that purpose. It would require, first, a determination of the distance between the box and the rail, then the projection of the moulding at the top of the box (which really caused the injury, striking plaintiff's shoulders), then he must return to the rail and calculate the distance which a car would probably project over the rail, then make an accurate mental measurement of his arm from the knuckles to the rear part of his shoulder, then make an accurate surmise as to the probable angle at which he would, or would have a right to, swing from the ladder and he might also have to determine whether or not, in the event he caught the ladder one rung too near the stirrup and doubled himself jackknife fashion, the rear and lower part of his body might protude further than would his shoulders if he were in the natural and more upright position, with the upper part of his body swinging out. In view of this can it be said as a matter of law that plaintiff was bound to know all these things merely because he knew there was a scale box there? If the margin is shown, after accurate measurements and tests, to be so comparatively small, plaintiff certainly cannot be charged with a lack of ordinary prudence in

not correctly gauging the distance when no occasion had before arisen so to do, and when the occasion did arise it was dark and the box not seen by him. There seems to have been a divergence of views at the trial as to the box being a safe distance from the track. Defendant's scale expert thought it safe if plaintiff had exercised proper care, and Superintendent of Terminals Smith was inclined to the same opinion, while Yardmaster Moore took a week to discover that one could not safely pass without "precaution." Switchman Williams says he discovered it the first day he worked there, when Fireman Butts discovered it by the special circumstance of "seeing the switchmen lean in and dodge it." If these employes of defendant, all of them experienced, hold such divergent views and had such varying experience, it seems but reasonable to allow to plaintiff at least some latitude in the matter. If these were all reasonable men and do not reach the same conclusion in the matter then it would seem that the question should be left to the jury, since the rule is that unless *all* reasonable men *must* arrive at the same conclusion upon a given state of facts to withdraw the question from the consideration of the jury would be improper.

The case might be different had plaintiff been injured on the scale track, as, in that event it might be reasonably contended that he must expect a scale box near the track, as would probably be the case if he went upon a coal chute track or one where a mail crane should

be erected, these being structures which, from their nature must be close to the track and these facts are known to all experienced railroad men, but no such rule obtains with reference to a scale box in its relation to side tracks other than the scale track itself.

While the second assignment of error in plaintiff in error's brief is vague it is gathered from all that is said under it that the construction of switch yards and structures therein must, in all cases be left to the judgment of the master, and that the application thereto of the technical knowledge of those employed in that behalf is conclusive against any negligence upon the part of the master, or at all events calls into action the doctrine of assumed risk, but it is not perceived why a jury may not as well inquire into the application of technical knowledge in the construction of the switch yards and structures therein as any other portion of the road or its instrumentalities. Although Scale Inspector West testified that he crowded track 2 with the scale box because the fulcrum lever of the scales is standard and of a certain length, and that there was no more room for tracks, yet Superintendent of Terminals Smith said there was room for 4 or 5 more tracks south of track 4. This being the case tracks 1 and 2 might have been further apart, or the scale box could have been placed on the north side of track 1, or on the south side of track 4, 51 feet south of its present location. The box was placed closer to track 2 than to track 1. Superintendent Smith says it is 17

feet from the center of track 1 to the center of track 2, and that such is standard distance. From the center of track 2 to the outside of the north rail thereof is 31 inches, from there to the scale box moulding is 45 inches; the scale box is 18 inches thick with 2 1-2 inch moulding on each side, giving a total of 99 inches, thus leaving 105 inches from the moulding on the north side of the scale box to the center of track 1. Deduct from this 31 inches from the center of track 1 to the outside of the south rail of said track and there is left 74 inches in the clear between the scale box moulding and the south rail of said track 1, thus indicating that scale manufacturers and railroads generally consider that distance necessary, because, presumably acting together, they have fixed the length of the standard fulcrum lever so as to require the scale box to be that far from the scale track. Thus it will be seen that there is probably a lack of the application of any technical knowledge so far as proximity to track 2 is concerned and the scale box was put in haphazard, as to the said track No. 2. Note that the fulcrum of the track scale is of such length as to require 74 inches in the clear between the outside of the nearest rail of the scale track and the scale box, and the scale box cannot be placed nearer to the scale track, and the plaintiff in error can be said to have a standard as to the scale track, but notwithstanding counsel in their brief would have the inference drawn that they also have a standard as to their tracks near the scale box, the evidence does not bear them out.

Their scale expert, referred to by counsel in their brief, testified as follows: "The scales are 16 inches from the side of the car on the side track at Shreveport Junction; 21 inches at Dallas; about 22 inches at Texarkana. In Jefferson there is no side track at that side; at Pecos City the scale is a joint one owned by the defendant and the Pecos Valley Railroad, and stands on joint ground where there is plenty of room," (Rec. p. 29), thus clearly showing that the plaintiff in error has no standard as to distance of side tracks from the scale box other than the scale track itself, since no two of the scales belonging to the company are the same distance from the side tracks nearest them, and where there are side tracks in its yards running alongside the scale box other than the scale track, they are all much closer to the scale box than common prudence would allow, and much closer than other railroads build them as shown by the testimony. (Rec. p. 22.)

In arguing this question of proximity of the scale box to track No. 2, counsel for plaintiff in error seek to class it with coal chutes and depot platforms, structures which it is a matter of common knowledge, and also given in evidence by the company's superintendent, must of necessity be built closer to the tracks than scale boxes, and every experienced railroad man is well aware of that fact, and the scale box structures are not to be classed with such as these. Taking the standard adopted by the company, any employe would have a right to presume that the scale box would not be built any nearer to an adjoin-

ing track than it would to the scale track; and that he would therefore have 74 inches clear space instead of 45 inches as in the case at bar. Counsel for plaintiff in error seek to impress that the scale box and scale track are standard. No complaint is made as to this, but the point of objection is that the scale box structure was too near the other track which was not in any way connected with the scales.

In their argument in this court, counsel for plaintiff in error persist in asserting that the "undisputed evidence" shows notice to defendant in error of the danger and also speak of it as establishing other facts, which are disputed and controverted at every point. Counsel upon the trial of the cause did the same thing, making the same erronous statements in making their assignments of error, and attention is here called to these facts that it may not be taken that counsel for defendant in error admits the correctness of these statements, with which the argument of counsel for plaintiff in error bristles.

The cause having been properly tried and the judgment being clearly for the right party, the defendant in error respectfully prays that same be affirmed.

Swearingen & Clark

Attorney for W. W. Swearingen,
Defendant in Error.